Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S–02–1353 OF 2004
ABDUL AZIZ MOHAMAD, JAMES FOONG AND ZULKEFLI JJCA
17 NOVEMBER 2006

Companies and Corporations — Directors — Breach of fiduciary duties — Conflict of interest — Directors separately engaged in other conflicting business — Business culture of company considered

Companies and Corporations — Members' right — Oppression — Directors separately engaged in other conflicting business — Business culture of company considered

Companies and Corporations — Members' right — Oppression — Whether subordination of minority shareholder's wishes to the power of the voting majority amounted to oppression — Whether substratum of company was still intact — Whether company ought to be wound up or court should order buy out of minority shares

Companies and Corporations — Oppression — Oppression of minority — Directors separately engaged in other conflicting business — Business culture of company considered — Subordination of minority shareholder's wishes to the power of the voting majority amounted to oppression — Whether company ought to be wound up or court should order buy out of minority shares

Companies and Corporations — Winding up — Petition under s 181 — Whether petition was founded on s 181 or on that section together with s 218 of the Companies Act 1965

The appellant's father held 40% of the total shareholding in the third respondent company known as Aerial Product Industries Sdn Bhd ('API'). The first and second respondents each held 20% and 40% respectively of the total shareholding of API. In 1996, the appellant played a more active role in the company and became a director of API until he resigned in 2001. Disputes then arose between the parties. Frustrated over his inability to rid the first and second respondents as directors of API, and failing to convince them to buy over his shares in the company, the appellant launched this action against the respondents. He claimed that he, as a member of API, had been oppressed and his interest disregarded. Also he alleged that he was discriminated against or otherwise prejudiced by the acts of the first and

second respondents. There were various allegations made by the appellant against the respondents, inter alia: (1) that Malaysia Workshop (owned by the first and second respondents) had been utilizing API's rejected industrial gas and not paying for it; (2) irregular payment of RM400,000 to Malaysia Workshop; (3) that the respondents had reduced the price of API's products around April 1998 under the pretext of a price war with other competitors in order to assist Acoxgas (also owned by the first and second respondents) penetrate the Sabah market by selling its products cheap. The first issue dealt with by the trial judge was whether this application of the appellant was founded on s 181 or on that section together with s 218 of the Companies Act 1965 ('the Act'). The High Court dismissed the appellant's originating petition, thus this appeal.

Held, dismissing the appeal:

(1) The intitulement did not mention or make reference to s 218 of the Act. It only specified s 181 of the Act. Then in the affidavit of the appellant in support of this application, s 181 of the Act was repeatedly mentioned as the provision of the law to base his claim on. Nowhere was s 218 of the Act ever referred to. By this, the appellant must confine his claim within the ambit of s 181 of the Act rather than be permitted to expand his claim into some other provision of the law (see para 37).

(2) From the business culture of the parties involved in API, it was their practice to be separately engaged in other business of their own which may even conflict with that of API as long as they were honest with each other in their dealings. Before the entry of the appellant into API this practice went on smoothly. API made profits for them and there was no quarrel among themselves. But the moment this fundamental trust was questioned and when one party started to dig into the affairs of the other then this entire culture collapsed. To accuse the first and second respondents of impropriety and lack of fair play was totally unfair and unacceptable especially when there was no cogent evidence to support this claim (see para 51).

(3) The first respondent had insisted in his testimony that for his de bono services to API, the directors of API (ie besides himself, the second respondent and the appellant's father) had agreed to allow him to channel this rejected gas to Malaysia Workshop for free. This claim was justified, particularly when this gas had no commercial value to API. If it was not given to Malaysia Workshop, then API would have released it into the atmosphere to evaporate. So this could not be viewed as oppressive to the appellant or that his interest was disregarded, and he being discriminated against and prejudiced (see para 54).

(4) As correctly pointed out by the trial judge, the first and second respondents were substantial shareholders and directors of API. They owed no fiduciary duty to the appellant in exercising their vote at board meetings and as shareholders they owe no duty to anybody as to how they exercise their vote. The mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed it

must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of the voting majority (see para 66).

(5) Though the appellant had lost confidence with the first and second respondents and vice versa, the substratum of the company was still intact. The company continued to operate as an entity separate and distinct from its shareholders. As an ongoing profitable enterprise there was no reason why the court should order it to be wound up or force one shareholder to buy out the other just because one did like the other. Without the appellant as a director, API was, relatively speaking, well managed and this was manifested by the rather substantial dividends dished out from time to time to shareholders for their investments. Under these circumstances there was no justifiable reason why the court in exercising its judicial discretion, based on just and equitable rule, should accede to the demands of the appellant particularly when there was cogent evidence that he did not come with clean hands (see para 72).

[Bahasa Malaysia summary

Bapa perayu memegang 40% pegangan saham keseluruhan dalam syarikat responden ketiga yang dikenali sebagai Aerial Product Industries Sdn Bhd ('API'). Responden-responden pertama dan kedua masing-masing memegang 20% dan 40% daripada pegangan saham keseluruhan API. Pada tahun 1996, perayu telah memainkan peranan yang aktif dalam syarikat tersebut dan menjadi pengarah APT sehingga beliau meletak jawatan pada 2001. Beberapa pertikaian telah timbul antara pihak-pihak tersebut. Berasa kecewa kerana tidak dapat membuang responden-responden pertama dan kedua sebagai pengarah-pengarah API, dan gagal meyakinkan mereka untuk membeli balik sahamnya dalam syarikat tersebut, perayu telah memulakan tindakan ini terhadap responden-responden. Beliau menuntut bahawa beliau, sebagai ahli API, telah ditindas dan kepentingannya tidak dipedulikan. Beliau juga mengatakan bahawa beliau didiskriminasikan terhadap atau sebaliknya diprejudiskan melalui tindakan responden-responden pertama dan kedua. Terdapat pelbagai pengataan yang telah dibuat oleh perayu terhadap responden-responden tersebut, antara lain: (1) bahawa Malaysia Workshop (milik responden-responden pertama dan kedua) telah menggunakan gas perindustrian API yang ditolak; (2) bayaran tidak tetap RM400,000 kepada Malaysia Workshop; (3) bahawa responden-responden telah mengurangkan harga produk-produk API sekitar bulan April 1998 dengan helah terdapat perang harga dengan pesaing-pesaing lain bagi tujuan membantu Acoxgas (juga dimiliki oleh responden-responden pertama dan kedua) untuk menembusi pasaran di Sabah dengan menjual produk-produknya dengan murah. Isu pertama yang dikendalikan oleh hakim perbicaraan adalah sama ada permohonan perayu ini adalah berdasarkan s 1818 atau berdasarkan seksyen tersebut bersama s 218 Akta Syarikat 1965 ('Akta tersebut'). Mahkamah Tinggi telah menolak petisyen asal perayu, oleh itu rayun ini dikemukakan.

Diputuskan, menolak rayuan tersebut:

(1) Tajuk tersebut tidak menunjukkan atau membuat rujukan kepada s 218 Akta

tersebut. Ia hanya menyebut tentang s 181 Akta tersebut. Bahkan dalam afidavit perayu yang menyokong permohonan ini, s 181 Akta tersebut telah berulang kali disebut sebagai peruntukan undang-undang untuk beliau memulakan tuntutannya. Seksyen 218 Akta tersebut tidak dinyatakan langsung. Oleh itu, perayu hendaklah menghadkan tuntutannya dalam skop s 1818 Akta tersebut dan tidak dibenarkan meluaskan tuntutannya melalui peruntukan undang-undang yang lain (lihat perenggan 37).

(2) Berdasarkan budaya perniagaan pihak-pihak yang terlibat dalam API, adalah amalan mereka untuk terlibat secara berasingan dalam perniagaan persendirian mereka yang lain yang mungkin bertentangan dengan API selagi mereka jujur antara satu sama lain dalam urusan mereka. Sebelum kemasukan perayu dalam API amalan ini berjalan dengan lancar. API mendapat keuntungan untuk mereka dan tiada perbalahan antara mereka. Namun apabila kepercayaan asas ini dipersoalkan dan apabila satu pihak mula mencungkil maklumat dalam urusan yang lain maka budaya tersebut telah dicemari. Untuk menuduh responden-responden pertama dan kedua berlaku tidak sopan dan bersikap tidak adil sememangnya tidak adil dan tidak boleh diterima terutamanya apabila tiada keterangan yang meyakinkan untuk menyokong tuntutan ini (lihat perenggan 51).

(3) Responden pertama telah menegaskan dalam pengakuannya bahawa untuk khidmat de bono beliau kepada API, pengarah-pengarah API (selain daripada beliau sendiri, responden kedua dan bapa perayu) telah bersetuju untuk membenarkan beliau menyalurkan gas yang ditolak ini kepada Malaysia Workshop secara percuma. Tuntutan ini dijustifikasikan, khususnya di mana gas ini tiada nilai komersial kepada PAI. Jika ia tidak diberikan kepada Malaysia Workshop, maka API akan melepasnya ke udara. Oleh itu ini tidak boleh dilihat sebagai penindasan terhadap perayu atau bahawa kepentingannya tidak dipedulikan, dan beliau didiskriminasikan dan diprejudiskan (lihat perenggan 54).

(4) Sepertimana yang dikemukakan oleh hakim perbicaraan dengan wajarnya, responden-responden pertama dan kedua merupakan pemegang-pemegang saham utama dan pengarah-pengarah API. Mereka tidak mempunyai tanggungjawab fidusiari terhadap perayu dalam membuat undian mereka di mesyuarat lembaga dan sebagai pemegang saham mereka tiada tanggungjawab kepada sesiapa berhubung cara mereka melaksanakan undian mereka. Penggunaan kuasa undian di mesyuarat lembaga atau di mesyuarat am untuk memastikan kelulusan resolusi yang mana ahli lembaga lain atau pemegang saham membangkang, tidak akan secara amnya menindas dalam erti kata sebenar ahli-ahli pemegang-pemegang saham tersebut, dan bukan mengenepikan hasrat mereka terhadap kuasa undian majoriti (lihat perenggan 66).

(5) Meskipun perayu telah hilang keyakinan dalam responden-responden pertama dan kedua dan sebaliknya, substratum syarikat masih kukuh. Syarikat tersebut masih terus beroperasi sebagai satu entiti berasingan dan berbeza daripada pemegang-pemegang sahamnya. Sebagai satu usaha berterusan yang menguntungkan tidak ada sebab kenapa mahkamah perlu memerintahkannya digulung atau memaksa salah satu daripada pemegang sahamnya menjual balik

yang satu lagi hanya kerana salah satu daripadanya tidak menyukai yang satu lagi. Tanpa perayu sebagai pengarah, API adalah, secara relatifnya, diurus dengan baik dan ini dapat dilihat dengan jelas oleh dividen-dividen yang cukup banyak diberikan kepada pemegang-pemegang saham untuk pelaburan mereka. Dalam keadaan sedemikian, tiada alasan yang dijustifikasikan kenapa mahkamah dalam melaksanakan budi bicara kehakimannya, berdasarkan rukun adil dan saksama, patut bersetuju dengan tuntutan perayu khususnya di mana terdapat keterangan meyakinkan menunjukkan bahawa beliau tidak melakukannya dengan niat baik (lihat perenggan 72).]

Notes

For cases on oppression of members' right, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 440–483.

For cases on oppression of minority, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 512–513.

For cases on breach of fiduciary duties of directors, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 161–170.

For cases on petition under s 181 of the Contracts Act 1965, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1220–1223.

Cases referred to

Dato Toh Kian Chuan v Swee Construction & Transport Company (Malaya) Sdn Bhd [1996] 1 MLJ 730 (refd)

Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492 (refd)

Harmer Ltd, Re [1959] 1 WLR 62 (refd)

Kong Thai Sawmill (Miri) Sdn Bhd, Re; Kong Thai Sawmill (Mm) Sdn Bhd & Ors v Ling Beng Sung [1978] 2 MLJ 227 (refd)

Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661 (refd)

Legislation referred to

Companies Act 1965 ss 181, 218

Appeal from: Originating Petition No S26–01 of 2000 (High Court, Sandakan)

Wong Kum Heng (William Liaw Chan & Co) for the appellant.
Jeyan Marimuttu (J Marimuttu & Partners) for the first and third respondents.
Gabriel Ho (Gabriel Ho & Co) for the second respondent.

James Foong JCA (delivering judgment fo the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court at Sandakan which dismissed the appellant's originating petition in the matter of s 181 of the Companies Act 1965 ('the Act').

A BACKGROUND AND COMPLAINTS OF THE APPELLANT

[2] In order to understand the appellant's grievances, it is necessary to set out the facts of this case in detail.

B **[3]** The appellant is 40 years of age and holds 600,000 fully paid up shares in a company known as Aerial Product Industries Sdn Bhd (API), the third respondent. This number of shares represents 40% of the total shareholding in API.

[4] The first and second respondents are also shareholders of API each holding C 300,000 and 600,000 fully paid up shares respectively. These represent 20% and 40% respectively of the total shareholding of API.

Formation and operation of API

D **[5]** API was incorporated in 1987 born out of an idea conceived at an informal tea session between the appellant's father, Hoy Egg Sun (Hoy), the first and second respondents and another called Tan Chan Piao (who subsequently sold his shareholding in API to the second respondent and therefore is not involved in this dispute). The objective of API was to set up a plant to manufacture industrial gas in Sandakan to cater to Sabah's needs.

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[6] Aside from Tan Chan Piao (who is no longer relevant) a little insight into the background of the parties behind the formation of API is necessary.

[7] The first respondent was 60 years of age around the time of the trial. He was F educated in England with a mechanical engineering degree. Before venturing out on his own, he had extensive experience in operating palm oil mills.

[8] The second respondent around the time of trial was 68 years of age and is a mechanic with a comprehensive understanding of machines. He has set up a business G called Malaysia Workshop to fabricate tanks, vessels and boilers as well as to undertake repairs on all sorts of engines.

[9] The first respondent after leaving his salaried job in 1983 joined the second respondent as a partner in Malaysia Workshop. Hoy, in the meantime, was a steel H supplier who came to know the first and second respondents in the course of his trade.

[10] After forming API, these three business associates 'in the time-honoured Chinese tradition of trust and mutual benefit and voluntary contribution for the well being of the Company which typified their relationship and conduct of the affairs of I the Company' proceeded to set up a factory for their enterprise.

[11] At the beginning, the first respondent was assigned the task of securing relevant licences and permits for construction and operation of the plant. Hoy's duty was to supply building materials for the plant and source relevant machinery from

China. The second respondent with his knowledge of mechanics was entrusted with installing the machines and ensuring that they function properly at all times.

[12] Once the factory was in production, the first respondent managed the day-today affairs of the company without remuneration and the second respondent looked after the operations of the factory. For this, he was paid a salary of RM3,500 per month. All major decisions of API were made by these three through informal consultation either over tea or by telephone. And to ensure mutual benefits be extended to family members of the parties, Hoy recommended his son-in-law's accounting firm to handle API's secretarial and accounting duties and this was duly accepted by the other two members.

Appointment of dealers

[13] Since API's core business was restricted to production, the retailing of its manufactured products was left to appointed dealers. But some of these dealers are closely associated with these three business associates. For example, Malaysia Workshop owned by the first and second respondents was appointed a dealer. Then there was the appointment of Palucky where Hoy was the proprietor. This was followed by the appointment of Perusahaan Kejuruteraan Am Sdn Bhd, a company where the first and second respondents and Hoy were shareholders. This arrangement of business outside that of API but yet associated with it personally was accepted by these three from the very beginning.

The appellant

[14] When API was incorporated and went into full production, the appellant was too young to be involved. Subsequently in 1996, he played a more active role in the company taking over much of what was done by his father. He became a director of API, with his father as an alternate, until he resigned in 2001.

Industri Teknik Kita Sdn Bhd

[15] As disclosed, Malaysia Workshop was appointed a dealer of API. But this dealership was transferred to Industri Teknik Kita Sdn Bhd (ITK) which was controlled by the first and second respondents. ITK did well and at one time was API's best dealer accounting for almost 70% of API's sales. Then around late 1998 and early 1999, the first and second respondents disposed off their shareholdings in ITK to a third party. When the new owners of ITK terminated their agency with API and subsequently became a dealer for a competitor API's sales suffered substantially. Not only this, ITK was also indebted to API for up to RM804,932 for goods sold and delivered but yet to be paid. This amount took a while to recover but though it was fully repaid, the appellant took issue over this with the first and second respondents.

Syarikat Hup Guan Oxygen

[16] Similarly, the appellant complained that the first and second respondents in control of API had not used their best endeavours to recover a sum of RM561,12l

due from Syarikat Hup Guan Oxygen to API. The reason cited is because the proprietor of Syarikat Hup Guan Oxygen was a close friend of these respondents. But this has proved to be untrue with opinions from API's solicitors revealing that this firm had no assets and the proprietor, a man of straw.

Acoxgas Sdn Bhd

[17] Sometime in early 1998, the first and second respondents incorporated a company known as Acoxgas Sdn Bhd (Acoxgas). This company was set up to manufacture industrial gas in Tawau. According to the appellant, this company is in direct competition with API and the first and second respondents did not disclose their conflicting interest in this company to the board of directors of API until 10 April 2000.

[18] The appellant also claimed that the first and second respondents had devised an agenda to assist Acoxgas penetrate into the Sabah market at the expense of API. This was done by reducing the price of API's products under the pretext of an on-going price war with other competitors. With prices lowered, Acoxgas would be able to sell their goods in the market and compete with other suppliers.

[19] Aside from the above, the appellant alleged that the first and second respondents had allowed Acoxgas to use API's empty gas cylinders by filling them with Acoxgas products and selling them as Acoxgas products.

[20] Finally, the appellant said that though Acoxgas is based in Tawau and API is in Sandakan, the entry of Acoxgas into the Tawau market would compete with API's appointed dealers in Tawau. This is detrimental to API.

Golden Harvest Enterprise

[21] Golden Harvest Enterprise was an appointed dealer of API in Tawau. They had used their own cylinders for APFs gas and payment was made for these supplies. The appellant was suspicious that the first and second respondents had bought into Golden Harvest Enterprise with the intention of changing its principal to Acoxgas. This, however, has proved to be incorrect. The first and second respondents had only bought Goldern Harvest Enterprise's cylinders not its retail business.

Rejected Oxygen

[22] To maintain a high standard of quality in API's products, oxygen produced by API has to be at least 99.5% pure otherwise end-users, who are normally welders, would not be able to cut their metal with a clean and smooth edge. Oxygen below this degree of purity is considered rejected product by API. Whilst it can still be used for cutting metal it does so with a lesser degree1 of perfection. Therefore, such gas if not used is released into the atmosphere to evaporate. According to the first

respondent, such rejected oxygen was given to Malaysia Workshop without charge as one of the perks for working without a salary in API. However, the appellant disputes this.

Claim of RM400,000 by Malaysia Workshop

[23] Animosity between the appellant and the first and second respondents came to a head when Malaysia Workshop presented a bill to API for RM400,000 for repairs and services carried out by Malaysia Workshop for API. The appellant questioned the authenticity of this claim and refused to sign API's cheque for this amount made out to Malaysia Workshop. This forced the first and second respondents, who are also signatories of all API's banking documents, to sign on this cheque and, indirectly, paid themselves.

Miscellaneous Matters

[24] When relationship began to turn sour and open confrontation followed, Malaysia Workshop began to charge API for office rental of RM1,500 a month instead of, as previously, a mere token sum of RM200. Although API owns a factory, its office is located on the first floor of Malaysia Workshop. This was originally intended to save cost and to facilitate the first and second respondents in carrying out their dual roles in running API and Malaysia Workshop with ease.

[25] Then the first respondent, who had never received any remuneration before for running the daily affairs of API, demanded to be paid a monthly salary of RM8,000.

[26] This was followed by the second respondent who insisted that his salary should be increased from RM3,500 each month to RM5,000.

[27] Aside from this, first and second respondents had taken out insurance coverage for themselves for RM1 million each with premiums to be paid by API.

[28] Following this, there was the purchase of a motor car by API for the first respondent.

[29] Furthermore, where API used to dump its industrial waste on the two adjacent pieces of land next to its factory which belong to a company controlled by the first and second respondents for free, there was now a monthly charge.

[30] All these demands by the first and second respondents or their associates were opposed by the appellant at various API board meetings but the appellant was constantly outvoted by the first and second respondents.

Actions of the appellant

[31] On 19 May 1999, with the assistance of a off-duty police officer and another, the appellant went to the premises of API and took away various documents which

A included API's machinery drawings, spare parts books, trouble-shooting operation and control manuals. Using some of these, he lodged a police report against the first and second respondents for selling industrial gas to Malaysia Workshop without billing them. Though the appellant claimed to have subsequently returned these documents and drawings he was unable to identify the person in API who
B acknowledged receipt of them. The loss of such vital documents and drawings was a setback for API which required the first and second respondents to reconstruct them in order to operate API's plant and business efficiently and effectively. For this, the second respondent had to travel to China to meet with the designers of the machines that were supplied to API. As to the consequences of the lodged police report, after investigation the police preferred no charges against the first and second respondents.

C

Financial status of API

[32] Since inception until 2001, API had made hefty profits and paid out the following dividends to the three shareholders:

D

In 1995: RM1,142,857.14

In 1996: RM1,000,000.

In 1997: RM1,900,000.

E In 2002: RM1,620,948.

[33] Throughout the years, API's annual financial accounts were never qualified by its auditor. But suddenly on 9 July 2006, the directors of API were presented with a heavily qualified financial report ending 28 February 1999 by its auditor (the brother-in-law of the appellant). This is rather strange not only because of its
F sudden appearance (because API's financial year did not end until 30 November 1999) but also because according to the first and second respondents no one had ever asked for it. Using this set of qualified accounts, the appellant alleged that the first and second respondents had mismanaged API.

G APPELLANT'S CLAIM

[34] Frustrated over his inability to rid the first and second respondents as directors of API, and failing to convince them to buy over his shares in the company, the appellant launched this action against the respondents. He claimed that he, as a
H member of API, had been oppressed and his interest disregarded. Also he alleged that he was discriminated against or otherwise prejudiced by the acts of the first and second respondents.

[35] In his application, he sought the following:

I (1) A declaration that the first and second respondents' appointments as directors of API are null and void.

(2) A declaration that the following board resolutions of API:

(a) to take out life insurance policies for the first and second respondents;

(b) to pay the first respondent a salary of RM8,000 per month;

(c) to increase the salary of the second respondent from RM3,500 per month to RM5,000;

(d) to sell its products to Malaysia Workshop at dealer's price;

(e) to approve the purchase of a motor car for the first respondent are null and void.

(3) And upon granting of the above declarations, the first and second respondents account to API for all the monies and benefits enjoyed by them.

(4) An order that the first respondent renders to API a complete account of all rejected gas supplied by API to Malaysia Workshop.

(5) That the first and second respondents account to API for all the gas cylinders taken by Acoxgas from API and then compensate API for these.

(6) That the first and second respondents account for all profits made by Acoxgas at the expense of API.

(7) That the first and second respondents take personal responsibility to repay API for the debt due and owing by Industri Teknik Kita Sdn Bhd and Syarikat Huat Guan Oxygen.

(8) That the first respondent repays API the sum of RM400,000 given to Malaysia Workshop.

(9) That the first and second respondents pay the appellant damages and costs.

(10) And finally an order that API be wound up.

FINDING OF THE TRIAL JUDGE ON THE LAW

[36] The first issue dealt with by the trial judge was whether this application of the appellant is founded on s 181 or on that section together with s 218 of the Act. According to the trial judge, the appellant's claim is based on 'a pot-pourri of complaints against the first and second respondents consisting of acts representing a combination of matters under both ss 181 and 218 of the Act'. Decidedly, the learned judge announced that this is not 'a hybrid petition' but one that falls squarely under s 181 of the Act.

[37] I am in full agreement with this finding. For a start, the intitulement did not mention or make reference to s 218 of the Act. It only specifies s 181 of the Act. Then in the affidavit of the appellant in support of this application, s 181 of the Act was repeatedly mentioned as the provision of the law to base his claim on. Nowhere is s 218 of the Act ever referred to. By this, I am of the view that the appellant must confine his claim within the ambit of s 181 of the Act rather than be permitted to expand his claim into some other provision of the law.

[38] Once this is established, the trial judge proceeded to lay down the test to be applied in an application under s 181 of the Act. And correctly, he reproduced the relevant excerpts from the judgment of Lord Wilberforce in the locus classicus case

of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Mm) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 dealing with s 181 of the Act. It is as follows:

> Section 181(1) and (2) of the Malaysian Companies Act 1965, are as follows:
>
> (1) Any member or holder of a debenture of a company or in the case of a declared company under Pail IX, the Minister, may apply to the court for an order under this section on the ground —
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) If on such application the court is of the opinion that either of such grounds is established the court may, with the view to bringing to an end or remedying the matters complained of, make such order it thinks fit and without prejudice to the generality of the foregoing the order may —
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> (b) regulate the conduct of the affairs of the company in future;
>
> (c) provide for the purchase of we shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
>
> (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
>
> (e) provide that the company be wound up.
>
> This section can trace its descent from s 210 of the United Kingdom Companies Act 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider s 186 of the Australian Companies Act 1951. But s 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-s (1)(a), it adds disregard of the interests of members, etc to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see *In re HR Harmer Ltd*). It introduces a new ground in sub-s (1)(b) and, most importantly, in sub-s (2), which sets out the kinds of relief which may be granted, it provides for 'remedying the matters complained of' and states as a specific type of relief that of winding up of the company....
>
> Secondly, for the case to be brought within s 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd*): their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure

to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v Drysdale*). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line...

Their Lordships agree that the wording of the section (and the same is true of section 181(1)(a)) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of section 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too tar. What is attacked by subsection (1)(a) is not particular acts but the manner in which affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied....

The remuneration of the Directors and of the Managing Director, which had been regularly voted and approved by the shareholders, was a matter for them and no case was made for interfering with their decision.

[39] To elaborate further, the trial judge once again in my view correctly quoted a passage from a text by *Walter Woon on Company Law* (1988) which was adopted with approval by the High Court in Malaya in *Re Tong Eng Sdn Bhd (Loh Loon Keng, petitioner)* [1994] 1 MLJ 451 at p 457 which says:

Section 216 (of the Companies Act of Singapore which is in pari mater ia with s 181 of the Act) embodies a member's personal right to be treated fairly....

Mismanagement of the company does not necessarily constitute oppression or disregard of a member's interests: *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242. Nor, indeed, does the fact that a member is consistently outvoted mean that he is oppressed or that his interests are being disregarded. It should be remembered that die majority also has rights. Section 216 does not give jurisdiction to the court to interfere with the internal management of companies which are being managed honestly and in accordance with the law: *Re Bright Pine Mills Pty Ltd* [1969] VR 1002

FINDING OF THE TRIAL JUDGE ON THE FACTS

[40] Though not entirely comprehensive but nevertheless sufficient, the trial judge proceeded to deal with the complaints of the appellant. I shall go through each of them, first disclosing the trial judge's findings, and then addressing the appellant's dissatisfaction over them as voiced in this appeal followed by my opinion.

Acoxgas

[41] In respect of Acoxgas, the finding of the trial judge is:

The petitioner has enumerated a host of acts and deeds attributed to the first and second defendants constituting conflicts of interest. I do not consider it necessary to subject them to critical scrutiny as these complaints relate to injury to the company, not to the petitioner

A as a member of the company, which is clearly outside the purview of s 181 of the Act. It is incomprehensible how the petitioner can be heard to complain about the first and second respondents in relation to Acoxgas Sdn Bhd when the petitioner has, together with his brother-in-law, one Ho Toh Chee, the company's auditor, incorporated Tawau Oksigen Plant Sdn Bhd way back in 1989 to also manufacture industrial gas and oxygen in direct competition with the company and it does not matter that Tawau Oxygen Plant Sdn Bhd
B has never been operational because what is sauce for the goose is also sauce for the gander. It must also be remembered that from its early days the founding members including the petitioner, each has, in one way or another, through different business entities, been in situations of conflict of interest in relation to the company.

C **[42]** On appeal, the appellant asserted the following:

(1) The incorporation of Tawau Oksigen Plant Sdn Bhd was never an issue. There was no complaint from the first and second respondents about this company. In any event, this company was never in operation.

(2) The first respondent has stated that the objective of setting up Acoxgas was to
D take over Industri Teknik Kita Sdn Bhd which the suspecting appellant believed would change its supplier from API to Acoxgas.

(3) Acoxgas has sold their products in areas covered by API's dealers, thus is in direct competition with API.

E (4) There was a plan by the first and second respondents to use Acoxgas to take over the business of API.

(5) There is evidence that Acoxgas had secretly filled API's cylinders with Acoxgas products. There also existed a mutual arrangement designed by the first and second respondents to allow API to fill Acoxgas cylinders in Sandakan while
F Acoxgas will do the same for API in Tawau. This was to assist Acoxgas to penetrate into the Sandakan market.

(6) Since the first and second respondents had allowed API's cylinders to leave API's plant unaccounted for it is presumed that these were meant for Acoxgas' use.

G (7) API has made losses for the years 1999, 2000 and 2001.

[43] According to the appellant, all these actions of the first and second respondents 'constitute a breach of fiduciary duty and conflict of interest amounting to oppression and/or fairness which is a visible departure from the standard of fair
H dealing and violation of the conditions of fair play'.

[44] Before I deal with these complaints, it is necessary to first state that Acoxgas, though involved in the manufacturing of the same products as API, is not based in Sandakan where API's plant, office and operation are located. It is in Tawau.

I **[45]** Secondly, when Acoxgas was incorporated, there was an offer by the first and second respondents to Hoy, the father of the appellant, to participate as a shareholder in this company. But Hoy turned it down preferring instead to invest in the

stock market. Thus, from the very beginning, there is no question of this company being secretly incorporated. A

[46] Thirdly, there is evidence to show that Acoxgas has from the start taken relevant precautions not to intrude into the established markets of API. Acoxgas had secured a list of API's dealers so that it would not entice or solicit API's business. B

[47] In fact API's business has been complemented by Acoxgas. To save transport charges for having to ferry API's cylinders back and forth to its only dealer in Tawau, Acoxgas has agreed to fill up API's cylinders with its own gas from its plant in Tawau at a very reasonable price. This arrangement is reciprocated by API for Acoxgas in Sandakan. And all these transactions were properly accounted and paid for by each party. Perhaps, because of this arrangement, the appellant is mistaken that Acoxgas were taking away API's cylinders for its own use. C

[48] On the allegation that the first and second respondents had intended to use Acoxgas to take over the business of API, there is no evidence to support this. In fact, if Acoxgas had intended this, then there is no reason why the first and second respondents disposed off their shareholdings in Industri Teknik Kita Sdn Bhd to a third party. D

[49] No doubt there was a dip in the income of API for years ending 1999, 2000, and 2001 but there is no convincing evidence to attribute this to Acoxgas as a competitor. As disclosed by the first respondent, which reasons I find fair and reasonable, the drop in income was due to: the termination of Industri Teknik Kita Sdn Bhd as agent for API; a price war with its competitors at the material lime which forced API to reduce the price of its products; the country's economic downturn, and finally the sabotage by the appellant in removing vital documents and drawings from API's plant. But it is very noticeable that soon after the appellant resigned as a director of API, the company bounced back to profitability. E F

[50] Indeed, the first and second respondents did not formally disclose their interest in Acoxgas to API until 10 April 2000, but, as stated, things in this company were not run in a manner that took pains to comply with every formality required by law. This relaxed attitude is also reflected in the non-disclosure by the appellant of his interest in Tawau Oksigen Plant Sdn. Bhd. This double standard forced the trial judge to rebuke the appellant with: 'what is sauce for the goose is also sauce for the gander'. G H

[51] It is my view that it does not matter whether Tawau Oksigen Plant Sdn Bhd is not operational, rather, the fact remains that there was no formal disclosure of this to the directors of API, and this is the issue raised by the appellant against the first and second respondents. From the business culture of the parties involved in API, it was their practice to be separately engaged in other business of their own which may even conflict with that of API as long as they were honest with each other in their dealings. Before the entry of the appellant into API this practice went on smoothly. API made profits for them and there was no quarrel among themselves. But the moment this fundamental trust was questioned and when one party started to dig I

into the affairs of the other then this entire culture collapsed. Now to accuse the first and second respondents of impropriety and lack of fair play is in my view totally unfair and unacceptable especially when there is no cogent evidence to support this claim.

Free supply of rejected industrial gas

[52] The learned trial judge's finding on the issue that Malaysia Workshop had been utilizing API's rejected industrial gas and not paying for it is as follows:

> The petitioner begrudges the fact that the first respondent has been obtaining from the company a free supply of industrial gas which is of no commercial value to the company and otherwise released to the atmosphere, an attitude aptly characterized by learned counsel for the first and second respondents as that of a dog in the manger.

[53] Now on appeal the appellant repeats this same accusation against the first respondent and adds that the free use of this rejected product was not disclosed to the appellant until the appellant inquired with the first respondent at a meeting.

[54] The first respondent has insisted in his testimony that for his de bono services to API, the directors of API (ie besides himself, the second respondent and Hoy) had agreed to allow him to channel this rejected gas to Malaysia Workshop for free. As did the trial judge, I find this claim justified, particularly when this gas has no commercial value to API. If it is not given to Malaysia Workshop, then API would have released it into the atmosphere to evaporate. So how can this be viewed as oppressive to the appellant or that his interest was disregarded, and he being discriminated against and prejudiced?

Payment of RM400,000 to Malaysia Workshop

[55] On the appellant's grievances over the payment of RM400,000 to Malaysia Workshop the trial judge has this to say:

> There is also allegation of an irregular payment of RM400,000 claimed by and paid to Malaysia Workshop by the Company. In my judgment this does not amount to conduct oppressive of the Petitioner because there is nothing sinister about this payment. The cheque for the payment was sent to the Petitioner the particulars of which were also given to him by one Miss Chong upon his request and more importantly, the Company's Auditor did not make any adverse finding in relation to the payment. In short, the petitioner's allegation is unfounded.

[56] Still insisting that the payment of RM400,000 to Malaysia Workshop is unsupported by convincing evidence to justify it, the appellant pointed out that the bills tendered by Malaysia Workshop for this claim do not correspond with the scope of work approved by the board of API.

[57] I have examined the board minutes of API referred to by the appellant and the bills tendered by Malaysia Workshop. Indeed some of these bills do not correspond

with the jobs as minuted by the API board. But nowhere did Malaysia Workshop ever state that these bills were only for jobs stated in the minutes. These bills were for all works that were duly rendered by Malaysia Workshop for API and this included, for example in bill dated 20 August 1998, 'transport charges for 76 empty cylinders from Tawau to Sandakan' and 'transport charges for 481 empty cylinders from KK to Sandakan' amounting to RM2,850.70. Such services were never disputed by the appellant as having been rendered nor those stated in other bills for materials and services other than those mentioned in the minutes. As these bills were legitimate they ought to be paid.

Price war allegedly to benefit Acoxgas

[58] The appellant has alleged that the first and second respondents had reduced the price of API's products around April 1998 under the pretext of a price war with other competitors in order to assist Acoxgas penetrate the Sabah market by selling its products cheap.

[59] On this issue the trial judge makes this finding:

> How this is so, defies logic, because conceivably it would have been more difficult for Acoxgas Sdn Bhd being a recent player to penetrate the market if prices offered by long-established manufacturers like the Company were low as it would have deprived Acoxgas the opportunity to sell its products by undercutting the established manufacturers. I find it rather inscrutable that the Company suffered loss as a result of the reduction in prices and in any event, this contention by the Petitioner is unsupported by evidence.

[60] I share the same sentiments as expressed by the trial judge. This accusation does not make sense. How can a price war, in an even playing field, benefit any particular manufacturer of the same product? I would have thought the only people who benefited from this would be the consumers. Every manufacturer has its own basic cost to produce its product. One cannot escape from this. In a price war among competitors it is my view that one manufacturer would be better off than the other if its manufacturing cost is lower than his competitor's. Unless there is proof to substantiate this, rather than just a mere comment by the appellant that Acoxgas had produced its product at a lower cost than API or other manufacturers of the same product, then this accusation of the appellant cannot be sustained. Then one must riot overlook the ability of financially stronger competitors to withstand long periods of price reduction in order to kill off their competitors who are financially weaker despite the fact that they themselves are losing money. So, there are many factors to consider in a free market situation before one can say that Acoxgas has benefited from this price war. And in the absence of a conclusive study that despite these influencing factors Acoxgas has benefited from this situation, I do not think that the appellant has proved this point against these respondents. Besides, the first respondent has given elaborate detail of why this policy of price reduction was practised: it was necessary for API to maintain its market share if API wished to compete with other producers who were dropping their prices. I accept this as a logical explanation and I find that there was nothing sinister about this move by the first and second respondents, it was just a marketing strategy and policy adopted by API.

API board resolutions passed

[61] The appellant's next complaint is that the first and second respondents passed board resolutions in API despite his protest and objection, These relate principally to the following:

(1) The introduction of salary for the first respondent and the increase in the pay for the second respondent.

(2) The purchase of a motor vehicle for the first respondent.

(3) The purchase of insurance policies for the first and second respondents.

(4) The increase in rental by Malaysia Workshop for the office space occupied by API.

(5) The charging of rent for the dump site.

[62] According to the appellant, since the first and second respondents have personal interest in these matters, by voting in favour of them the first and second respondents have breached their fiduciary duty to act in the best interests of API.

[63] Over this, the trial judge has this to comment:

> It is painfully apparent that the foregoing instances encompass matters ranging from those that can properly be described as trivial to matters that clearly relate to the management of the affairs of the Company. Applying the principles set out in *Re Kong Thai Sawmill* and *Re Tong Eng Sdn Bhd*, I am of the view that those acts do not constitute oppression and further support for this can be found in the judgment of Mohd Ghazali J (as he then was) in *Dato' Toh Kian Chuan v Swee Construction And Transport Company (Malaya) Sdn Bhd* [1996] 1 MLJ 730 at p 748...
>
> I have, without any disrespect to learned counsel for the petitioner, considered it rather unnecessary to deal at length with the extensive submission on matters relating to alleged breaches or fiduciary duty by the first and second respondents. This is because I do not think they are of any relevance in that the first and second respondents are not only directors but shareholders of the company and their combined shareholding of 60% give them the majority voting power. In these circumstances, the first and second respondents do not owe any duty to the petitioner as to how they exercise their votes.

[64] Still insisting that the first and second respondents had not acted bona fide in passing these resolutions the appellant insisted that 'majority rule (in API has) passes over into rule oppressive of the minority', and done purposely to retaliate against the many queries raised by the appellant on the impropriety of the first and second respondents in handling the affairs of API.

[65] I am of the view that indeed the resolutions passed on the principal matters referred to above were in retaliation to the acts of the appellant. But I do not think that they were done mala fide. From the inception of API up to the time when the appellant participated in the affairs of the company, the working relationship of the then directors was cordial, relaxed and casual. And this had worked out well for all as can be seen from the profitable returns of API. In this spirit of give and take, many

things were carried out either free of charge or below cost. For example, why should the first respondent take on the management of API for free and even without a car provided by the company to go about the company's business? Or for that matter, the second respondent's remuneration being lower than the prevailing market value for his position? Then, who would be prepared to allow industrial waste to be dumped on his land without charge or his office be rented out at a nominal fee? Such sacrifices could only come about when there is an attitude of give and take. But when the appellant began to upset this norm and, worse, to question the integrity and probity of these respondents when they were honest and truthful and had faithfully contributed to the company, then it is only natural that they retaliate by claiming and charging whatever that is rightfully due to them. This is legitimate and, like the trial judge, I do not think that the acts of these respondents constituted oppression.

[66] As to the appellant's claim of there being a breach of fiduciary duty, I find this absurd. As correctly pointed out by the trial judge, the first and second respondents are substantial shareholders and are directors of API. They owe no fiduciary duty to the appellant in exercising their vote at board meetings and as shareholders they owe no duty to anybody as to how they exercise their vote (*Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661). And the 'mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which other members of the board or shareholders oppose, would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed, it must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of the voting majority (*Re Harmer Ltd* [1959] 1 WLR 62 at p 87 per Romer LJ' accepted in *Dato Toh Kian Chuan v Swee Construction & Transport Company (Malaya) Sdn Bhd* [1996] 1 MLJ 730.

The financial status of API

[67] The trial judge has made an observation towards the end of his judgment to indicate that API is in a 'robust and healthy state as shown in the audited accounts'. The appellant before us disputed this claim. He disclosed API's losses for the following periods:

As at 30 November 1999 a sum of RM302,811.

As at 30 November 2000 a sum of RM178,855.

As at 30 November 2001 a sum of RM14,744.

As at 30 November 2002 a sum of RM654,295

But in the year 2003 a profit of RM391,439.

[68] But these losses, aside from other factors which I shall be discussing later, are largely contributed to by the acts of the appellant who persistently upset the management with demands and inquiries, and then removed, without authority and for no apparent reason except, in my view, to sabotage the operation of API, vital drawings and documents necessary to operate API's plant. He then used some of these as a basis to lodge a police report implicating the first and second respondents

A which later turned out to be unsubstantiated when no criminal charge was ever preferred against the first or second respondents. Further, having admitted to taking away such documents and drawings, the appellant could not convincingly account for their return to API resulting in the second respondent having to travel overseas to source for them in order to avoid any major disruption in the company's production system. These loathsome activities had disrupted the smooth running of B the company and instead of concentrating on maintaining profitability and improving productivity, the energy of the directors was diverted to entertaining internal squabbles caused by the appellant. These had severe consequences on the business of the company. But upon the resignation of the appellant as director of the company in 2001, the profit of the company returned and this is well reflected in C API's account for 2003. So the losses for the periods stated, in my view, are to a very large extent contributed to by the actions of the appellant. When this is a fact, then the appellant cannot now turn around and blame the first and second respondents.

[69] Other contributing factors to the losses, as disclosed by the first respondent, D are as follow:

(1) Industri Teknik Kita Sdn Bhd, the biggest and best performing dealer of API, terminated their dealership with API and moved over to a competitor. The company needed time to build up new and existing dealers to fill this vacuum.

E

(2) When Industi Teknik Kita Sdn Bhd terminated their dealership there was a debt of over RM804,932 due and owing by this company to API. It took a while for API to fully recover this sum.

(3) There was the price war among competitors in the trade and this has cut into the profit margin of the company.

F

(4) There was the economic downturn which affected most business in the country and API was not spared.

[70] These, to my mind, are legitimate reasons where no fault can be attributed to G the first and second respondents as executive directors of API, least of all utilizing their position to oppress the appellant, disregard his interest as well as to discriminate against or otherwise prejudice him.

Other accusations

H

[71] Towards the end of his submission, counsel for the appellant has accused the learned trial judge of not taking into consideration the fact that mutual confidence among the appellant and the first and second respondents and the substratum of API have broken down warranting either API be wound up or the first and second respondents be ordered to buy the appellant's share at market price.

I

[72] Though I believe that the appellant has lost confidence with the first and second respondents and vice versa I am of the opinion that the substratum of the company is still intact. The company continues to operate as an entity separate and distinct from its shareholders. As an ongoing profitable enterprise there is no reason

why the court should order it to be wound up or force one shareholder to buy out the other just because one does like the other. Without the appellant as a director, API is, relatively speaking, well managed and this is manifested by the rather substantial dividends dished out from time to time to shareholders for their investments. Under these circumstances, there is no justifiable reason why the court in exercising its judicial discretion, based on just and equitable rule, should accede to the demands of the appellant particularly when there is cogent evidence that he did not come with clean hands — see *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 at p 507.

CONCLUSION

[73] For reasons as stated above, the appellant's appeal was dismissed with costs and his deposit for this appeal ordered to be paid towards the account of taxed costs.

[74] These grounds of judgment have the concurrence of my learned brothers, Abdul Aziz Mohamad JCA (now FCJ) and Zulkefli JCA.

Appeal dismissed with costs.

Reported by Loo Lai Mee